

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of

CITY OF KENT,

For Declaratory Relief Interpreting
Schedule 71 of Electric Tariff G.

NO. UE-010778

PUGET SOUND ENERGY, INC.'S
RESPONSE TO BENCH QUESTIONS

CITY OF SEATAC,

Complainant and Petitioner,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

NO. UE-010891

CITY OF AUBURN, CITY OF
BREMERTON, CITY OF DES MOINES,
CITY OF FEDERAL WAY, CITY OF
LAKEWOOD, CITY OF RENTON, CITY
OF SEATAC, CITY OF TUKWILA,

Complainants,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

NO. UE-010911

PSE sets forth below its responses to the questions posed by the Bench on June 27, 2001.

Question for PSE to address:

1. Will PSE consent in writing in each of the dockets to the entry of a declaratory order that could be adverse to PSE? (See, RCW 34.05.240(7)).

Provided that adequate process is provided to PSE, PSE will consent to a declaratory order for most of the issues in these dockets. Specifically, PSE will consent to the entry of a declaratory order that may be adverse to PSE for the following issues:

(A) Whether PSE's requirement that underground facilities (other than cable and conduit) and pad-mounted facilities, such as vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults, be placed on private property within easements that are in the Company's standard form is consistent with Schedule 71;

(B) Whether PSE is obligated to pay the costs of obtaining the operating rights required under Section 4 of Schedule 71;

(C) Whether PSE is obligated to convert its facilities from overhead to underground under Schedule 71 if operating rights required under Section 4 are not provided to PSE;

(D) Whether the sections of PSE's Underground Conversion Agreement and Engineering Agreement which provide that PSE may voluntarily agree to obtain operating rights for a conversion, on the condition that the municipality reimburse PSE for its costs to obtain such operating rights, are consistent with Schedule 71;

(E) Whether PSE is obligated under Schedule 71 to place facilities in rights-of-way that it otherwise would have placed on private property in the absence of a municipality's agreement to pay 100% of the costs to relocate such facilities in the future;

(F) Whether Section 1.e. of PSE's Underground Conversion Agreement is consistent with Schedule 71; and

(G) Whether Schedule 70 or Schedule 71 applies to the work to be performed for the conversion described in the City of SeaTac complaint.

However, PSE will **not** consent to a declaratory order regarding:

(A) Interpretations of franchises or the Washington Constitution, which are outside the scope of the Commission's authority; or

(B) Any refunds to cities that might be requested as a result of a declaratory ruling against PSE as to the application of Schedules 70 or 71. Refund issues promise to be much more individualized and fact-intensive than the issues listed above, and will not be adequately explored or developed in a declaratory order proceeding.

Questions for PSE and the City of Kent to address:

2. Should the City of Kent petition be deemed to be a complaint?

No. The City of Kent petition should not be deemed to be a complaint. The City of Kent's petition requires an interpretation of Schedule 71 for the purpose of determining *prospectively* how the parties will proceed with respect to a future street improvement to International Boulevard and corresponding modifications to PSE's facilities. A declaratory order proceeding is the appropriate context in which to address these questions. Moreover, in its petition, the City of Kent only requested a prospective declaration of its obligations and PSE's obligations with respect to the prospective underground conversion; it did not request retrospective relief for any alleged prior harm.

3. Does the Commission have jurisdiction to interpret the City of Kent's franchise agreement with PSE?

No. The Commission does not have authority to issue any order in this proceeding with respect to any franchises. An agency's authority to issue declaratory orders is limited to "the applicability to specified circumstances of *a rule, order, or statute enforceable by the agency.*" RCW 34.05.240(1) (emphasis added). Even if the City of Kent had filed a complaint, the Commission's jurisdiction to issue any order is limited to matters governed by the public service laws, RCW Chapter 80. *See* RCW 80.01.040(3); *Cole v. Washington Utils. and Trans. Comm'n*, 79 Wn.2d 302, 306, 485 P.2d 71 (1971).

The Commission has authority to interpret and enforce PSE's Electric Tariff G, which was filed with the Commission pursuant to RCW 80.28.060, and has the force and effect of law. *See Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 719 P.2d 879 (1986). However, PSE's franchise with Kent is not a rule, order or statute, but rather a contract between PSE and the City of Kent. *See id.* at 584. Franchises are not the subject of the public service laws, RCW Chapter 80. Instead, the Legislature has provided for utility franchises through statutes governing the powers of municipalities. *See* RCW 35.22.280(7), 35A.47.040. Franchises are subject to the rules of contract interpretation, *City of Issaquah v.*

Teleprompter Corp., et al., 93 Wn.2d 567, 578 (1980), which is a matter for the courts, not this Commission.¹

4. Is interpretation of the franchise agreement essential to the resolution of the issues that the City seeks?

No. Interpretation of Schedule 71 will be dispositive of the issues presented in the City of Kent's petition.

Questions for all parties to address:

5. Is there a dispute as to the underlying facts? May the Commission make the decisions on fully or partially agreed factual records? What facts must be found to support a decision (couched in terms of "whether")? Which of these facts, if any, are agreed?

At this time, PSE is uncertain whether there are disputes as to any underlying material facts in the three dockets. PSE believes that the parties should be able to stipulate to the facts necessary for the Commission to issue a decision with respect to the application of Schedules 70 and/or 71 in all three dockets, except with regard to the request for certain refunds (the "Refund Issue") set forth in the prayer for relief in the complaint filed by the City of Auburn, *et. al*, Docket No. UE-010911 (the "Multicity Complaint"). With regard to the Refund Issue, the petitioners in the Multicity Complaint did not set forth any specific facts underlying their refund claim. If the Refund Issue is addressed, individualized facts will need to be developed and addressed, and there may be factual disputes. PSE believes that if the Refund Issue is considered at all in the Multicity Complaint proceedings, it should only be addressed in a subsequent phase of the proceeding.

¹ Of course, the Commission has the power to abrogate franchise provisions where a franchise purports to govern the rates or services provided by a utility to the public. *See State ex rel. Seattle v. Seattle & R.V. Ry.*, 113 Wash. 684, 194 P. 820 (1921).

In addition, interpretation of a franchise may require that certain issues that are within the primary jurisdiction of the Commission be considered and ruled on by this Commission. For example, where a franchise defers to PSE's filed tariff with respect to an issue, as does the City of Kent's Franchise, it is appropriate that this Commission rule on the proper interpretation of the tariff. Such tariff interpretation is the only matter that is appropriately before this Commission.

PSE believes that the facts necessary to support a decision concerning the issues raised in the City of Kent petition and the Multicity Complaint, excluding the Refund Issue, are as follows:

(A) Whether cities, from time to time, plan to undertake street improvement projects that necessitate relocation of PSE's overhead facilities located in city rights-of-way. (Agreed)

(B) Whether cities, from time to time, request that PSE convert its overhead facilities to underground rather than merely relocating the overhead facilities to a new location to accommodate the street improvements. (Agreed)

(C) Whether, as a condition of performing any conversion of its overhead facilities to underground, PSE requires that easements in PSE's name and in PSE's standard form be provided for placement of underground facilities (other than cable and conduit) and pad-mounted facilities, such as vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults on private property in the conversion area. (Agreed)

(D) The property rights PSE requires are easements granting PSE the right to construct, operate, maintain, repair, replace, improve, remove, enlarge, and use the easement area for its facilities, and preventing inconsistent encroachments into the easement area; PSE does not require that it be provided with fee ownership of property for its facilities. (Agreed)

(E) Whether PSE requires that such easements be provided for underground conversions regardless of whether the property owners in the conversion area or a municipality with jurisdiction over the conversion area are requesting the conversion. (Agreed)

(F) Whether, where a municipality has requested the conversion, PSE will agree to assist in obtaining and/or obtain such easements, provided that the municipality reimburses PSE for its costs to obtain such easements. (Agreed)

(G) Whether PSE requires, as a condition of performing any conversion of its overhead facilities to underground, that the requesting municipality executes PSE's form Underground Conversion Agreement and form Engineering Agreement, which contain provisions requiring that the municipality provide easements for placement of PSE's facilities and/or reimburse PSE for 100% of PSE's costs to obtain such easements. (Agreed)

(H) Whether, if a municipality refuses to execute such agreements, PSE refuses to convert its overhead facilities to underground, and instead agrees only to relocate its overhead

facilities to new locations within rights-of-way in the conversion area to accommodate the street improvement. (Agreed)

PSE believes that the facts necessary to support a decision concerning the issue raised in the City of SeaTac complaint are as follows:

(A) Whether the City of SeaTac ("SeaTac") has requested that PSE convert its overhead facilities along South 170th Street between 37th Avenue South and Military Road South (the "Conversion Area") to underground. (Agreed)

(B) Whether SeaTac claims that PSE should undertake the conversion under the terms of Schedule 70, while PSE claims that Schedule 71 applies to the conversion. (Agreed)

(C) Whether South 170th Street is a collector arterial that provides access between Military Road South and International Boulevard (Highway 99), as well as SeaTac Airport, which are commercial areas. (Agreed).

(D) Whether SeaTac's planned street improvements will further result in South 170th Street serving as an arterial connecting commercial areas of the city, including serving as part of SeaTac's light rail pathway. (Agreed)

(E) Whether SeaTac's plans for South 170th Street include rezoning the area to permit commercial operations. (Agreed)

(F) Whether the buildings currently located within the area served by the system on South 170th Street between 37th Avenue South and Military Road South are primarily residential dwellings, but also include a home school and a metal stripping shop. (Agreed)

(G) Whether PSE's existing overhead facilities in the Conversion Area are a three-phase system, not a single-phase system. (Agreed)

(H) Whether PSE's three-phase electrical system on South 170th Street is part of the distribution backbone that connects PSE's system together in SeaTac. (Agreed)

(I) Whether Phase 1 of SeaTac's underground conversion of South 170th Street was performed by PSE pursuant to Schedule 71. (Agreed)

(J) Whether developed commercial areas in PSE's service territory contain three-phase electrical systems. (Agreed)

(K) Whether PSE installs single-phase systems in areas that are purely residential, and does not install three-phase systems in a residential area unless load exists in the area that needs such a system. (Agreed)

(L) Whether underground conversion of a three-phase system is fundamentally different than underground conversion of a single-phase system, in that undergrounding of a three-phase system requires construction of a parallel single-phase underground system to serve individual, single-phase customers that were formerly served by one phase of the overhead, three-phase system prior to the conversion. (Agreed)

6. When are orders needed?

The Commission may be able to issue orders relatively quickly, after streamlined proceedings on stipulated facts, as set forth above. However, PSE objects to conducting these proceedings on an expedited basis, particularly if the discovery rule is invoked or if there are any evidentiary hearings. Municipalities, including the cities that have filed the present proceedings, have raised issues concerning PSE's application of Schedule 71 at least as far back as 1985. Cities have been planning improvements with respect to Highway 99 for several years, and PSE's position with respect to requiring easements has been clear from the beginning. The Cities could have filed petitions with the Commission at any time. To the degree there is any urgency with respect to a particular project (which PSE does not admit), the Cities' delay in bringing their concerns to the Commission's attention is the sole cause of any such urgency.

7. Are these issues being considered in any other setting -- for example, a rulemaking? If so, would decisions in that docket resolve the questions posed in the petition?

PSE is unaware of any other proceedings in which issues critical to these three dockets will be resolved.

8. Is a petition for declaratory order in each of these dockets an appropriate procedural mechanism? If so, what process should be employed to make a determination, and how would a declaratory order differ in form and effect from an order resolving a complaint?

City of Kent Petition/Multicity Complaint:

PSE believes that a petition for declaratory order is an appropriate procedural mechanism for most of the issues in these dockets, as set forth in the answer to Question No. 1, above. Specifically excluded, however, as described above, are interpretations of

franchises and the Washington Constitution, over which the Commission does not have jurisdiction, and the Refund Issue, which would require much more individualized attention and the traditional adjudicative proceedings and burdens of proof required in a complaint case.

Declaratory orders are likely to be the most expedient manner in which to resolve the questions presented in these proceedings and the most efficient use of the Commission's time. PSE and the Cities simply disagree with respect whether Schedule 71 requires the easements the Cities have contested. The parties should be able to stipulate to a set of generalized facts that would permit the Commission to address these questions. Once the Commission answers fundamental questions concerning the easements and Schedule 71, the parties should be able to work out details concerning individual projects and PSE's form underground conversion agreement in compliance with the declaratory orders.

PSE believes that declaratory orders would set forth the Commission's interpretation and application of Schedules 70 and 71 as to the stipulated facts, leaving to the parties the responsibility to conduct themselves accordingly with respect to particular projects. By contrast, a complaint order would be much more individualized to a particular project, and might address issues such as retroactivity of the Commission's decision, potential refunds, limitations periods, etc.

City of SeaTac Complaint/Petition

The City of SeaTac's Complaint and Petition in Docket No. UE-010891 ("SeaTac Complaint") could be addressed through either a declaratory order or order on complaint, or a single order that addresses both standards. The SeaTac Complaint concerns a single project, and whether that project should be converted under the terms of Schedule 70 or 71. Since no conversion has yet occurred, no refund issues are presented. The proceeding is likely to be resolved on briefing on stipulated facts.

Process

PSE believes that each docket may be adequately resolved using the following procedures:

(A) The Parties reach a stipulation as to material facts (and indicate any facts that a party believes are material that are in dispute, along with each parties' contention as to those facts). PSE suggests that the parties attempt to reach agreement on such stipulated facts at the prehearing conference, with the assistance of the Bench, using the parties' responses to Question No. 5 as the basis for discussion. That will permit a more focused discussion of the

need for any exchange of information and the scope of such information exchange, the timing of briefing, and whether evidentiary hearings should be set.

(B) The petitioners file an opening brief based on the stipulated facts, PSE files a response brief, and the petitioners file a reply brief.

(C) To the degree the proceedings are not resolved on briefing (i.e. due to a finding that a material fact is in dispute), the Commission should take pre-filed testimony and conduct a cross examination hearing on the material factual issues that are in dispute. Limited post-hearing briefing to supplement the earlier briefs should be permitted, solely to address the factual matters presented at the hearing and their impact on the earlier briefing.

9. Are there common questions of law or fact such that consolidation of these dockets is appropriate under WAC 480-09-610? What factors should be considered in deciding whether to consolidate?

In determining whether to consolidate these dockets, the Commission should consider the proportion of common questions of fact and law and the adequacy of resolving the issues in each docket with the same procedures and procedural timeline.

There are common questions of law and fact sufficient to justify consolidating the issues raised in the City of Kent complaint and the Multicity Complaint, which both essentially challenge whether PSE's facilities are to be placed on private easements when PSE performs an underground conversion. To resolve such issues, the Commission would be answering many of the same legal questions and it could use the same set of stipulated facts to do so. Also, the Kent and Multicity issues could easily be resolved using the same procedures and the same procedural timeline.

The SeaTac Complaint should remain in its own docket. The factual and legal issues raised by such complaint are very specific and not sufficiently similar to either the Kent or Multicity dockets to be consolidated with either of them. To decide the SeaTac Complaint, the Commission will not be addressing the question of easements, and instead will be deciding whether Schedule 70 or Schedule 71 applies to a particular conversion in SeaTac.

DATED: July ___, 2001.

PERKINS COIE LLP

By _____
Kirstin S. Dodge
Attorneys for Puget Sound Energy, Inc.